



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS FOR JUDGMENT

Case No: CA 9/2009

In the matter between:

NICOLOUS KAYOKA

FIRST APPELLANT

JOSEPH KAMONA

SECOND APPELLANT

KUPEPA DETLIF MBAMBO

THIRD APPELLANT

KASOMA VINCENT KAMUTJONGA

FOURTH APPELLANT

vs

THE STATE

RESPONDENT

Neutral citation: *The State v Kayoka and others* (CA 9-2012) [2012] NAHCMD 98
(29 October 2012)

Coram: VAN NIEKERK J and HINDAAJ

Heard: 20 June 2010

Delivered: 29 October 2010

REASONS FOR JUDGMENT

HINDA, AJ (VAN NIEKERK, J concurring):

[1] This appeal was heard on 20 June 2010 and having considered argument on behalf of both the appellants and the State, the Court came to the conclusion that the appeal must succeed, that the convictions and sentences must be set aside and that the reasons will follow in due course. The following are our reasons.

Reasons

[2] The appellants were charged with robbery with aggravating circumstances. All the appellants pleaded not guilty. Despite the plea, all of the appellants were convicted and each sentenced to sixteen (16) years of imprisonment of which five (5) years imprisonment were suspended for five years on the usual conditions.

[3] In essence, the complainants' case was that on 14 August 2005, they had been robbed by the appellants, who were armed with pistols and clad in camouflage, of R 9000.00 and property valued at Botswana Pula 1640. The appellants filed a notice of appeal against both conviction and sentence that is adorned with multiple grounds of appeal.

[4] The conviction of the appellants in this matter is principally premised on a purported confession (in respect of the first and second appellants) and evidence of identification (in respect of first, third and fourth appellants). Those two issues arise for consideration and decision. I have to be satisfied that the confession and identification is in terms of the law.

The State's case

[5] The first state witness was one Eskin Thando Mokate who testified that he is a farmer and a mechanic who resides in Botswana and that on 12 August 2005, he in the company of Mr. Jacobs and one KK entered Namibia to fish in our waters. On 13 August 2005, Mokate met the second appellant whom he had known from before as a refugee in Botswana. The second appellant invited Mokate and his friends to his house and offered them food to eat and it is at that occasion that the second appellant informed Mokate about some people in Angola that are interested in selling diamonds and insisted that Mokate lend him money to buy diamonds. Mokate, in turn, approached Jacobs and asked for money to give to the second appellant so that Mokate "*can get rid of Joseph*". Mokate did not give the second appellant the money and they left. They agreed to meet the next day.

[6] On 14 August 2005, Mokate and his friends met up with the second appellant and they all drove towards the Namibia/Angola border to arrange for an extension of their visas in order to stay longer in Namibia. Whilst *en route* to the border the second appellant requested the driver, Jacobs, to stop the motor vehicle so that he may relieve himself. Jacobs obliged and the second appellant alighted from the vehicle and went into the bush. Within a few moments three men armed with pistols and clad in camouflage uniforms emerged. The three men assaulted Mokate and his friends and robbed them of R 9000, 00; three cell phones and one pair of trousers. This witness identified appellants one and four as the assailants and claimed that second appellant is involved because he had pre-arranged the robbery.

[7] During cross-examination it was established that Mokate had made a witness statement to the Police shortly after the robbery incident. In that statement he told the police that he was called by the second appellant and informed that there were people from Angola at Mushangara Village who had diamonds for sale. On 13 August 2005, Mokate in the company of Jacobs and one KK, went to the house of the second appellant who informed them that he was going to call the Angolans to come meet which did not materialise. They agreed to meet the next morning. On 14 August 2005, Mokate, Jacobs and KK returned to the second appellant's house

but did not find the second appellant home. They met up with him later in the road and they all returned to a place near second appellant's house and stopped in the road where the second appellant told Mokate to take the money and follow him into the bush to meet the Angolans. Mokate refused and suggested that the Angolans come to second appellant's house at around 12h00. As they jumped back into the motor vehicle, two men armed with pistols and clad in camouflage uniforms came out of the bush said to them "*stop you are dealing illegally, we are the police.*" The men took his cell phone, started searching the car and then ran away.

[8] Camaldin Jacobs (*Jacobs*) was the next State witness. He is the Managing Director of Kaikomo Butchery in Francis Town, Botswana and he testified that he , Mokate and KK entered Namibia on 12 August 2005 to fish. Curiously, he added that *they were on their way to Zambia.*

[9] Jacob's evidence on the robbery was that on 14 August 2005 whilst driving towards the Angola-Namibia border and close to a bushy area, the second appellant had asked him to stop the motor vehicle for him to relief himself. He obliged and the second appellant jumped out of the back of the motor vehicle and went into the bush. Within two minutes two men armed with pistols and clad in camouflage came from the bush in the same direction that the second appellant went into. The men pulled him out of the motor vehicle and hit him with the pistol whilst accusing them of dealing in fire-arms. He claims to have seen a third attacker though not properly and identified the third appellant as the man who assaulted him whilst at the same time asking for the whereabouts of money.

[10] Jacobs identified appellants three and four as the two robbers at the scene. His identification of them is because the third appellant is the one who be assaulted and stripped him. The fourth appellant is the person who had assaulted Mokate. He was unable to identify the third assailant.

[11] The next State witness was Mr. Mahunga, who identified the first appellant "*because he was present at the scene*" and claims that the first appellant was the person who was behind him and pointed a fire-arm at him. Mahunga informed the

police, on three occasions that the third and fourth appellants were also at the scene. However, this material fact was not recorded in his witness statement.

[12] The first appellant claims that Mahunga implicates him because of Mahunga's inability to settle a debt long outstanding and denies having been at the scene.

[13] The next State witness was the police officer, Mr. Simbwaye, Unit Commander: Complaints and Discipline; Namibian Police stationed at Rundu. He testified that on 10 October 2005 he was called by Sergeant Tjoro to attend at Mukwe Police Station because there were two suspects (appellants one and two) who were willing to confess. He departed to Mukwe Police Station and interviewed appellants one and two who confessed to a magistrate and implicated the third and fourth appellants.

The state closed its case.

Defence case

[14] The first appellant denied any involvement in the robbery. His version was that on 14 August 2005, he and the fourth appellant went to Mahunga's house in Kake Village for him to collect money that was owed to him by Mahunga and that the latter is falsely implicating him because of money that he owes him. On the confession, he testified that the police gave him the names of appellants three and four to include in his confession to the Magistrate on the promise of being released and that he implicated appellants three and four after being forced and assaulted by officer Nilengani and Sergeant Tjoro.

[15] The next was second appellant who testified that he left Mokate and the others in the car to relieve himself. He further testified that they were all well and denied involvement. He testified further that the names of the third and fourth appellants were given to him by Simbwaye to implicate the others and that he did that under duress.

[16] The third appellant testified that on 14 August 2005 he was in Rundu busy with a lease transaction and remained in Rundu until 15 August 2005. He denied

that he had a golden tooth then. He accused the police of falsely incriminating him and claimed that had he been involved, why Mahunga did not give his name to the police. Despite the fact that some of the appellants called witnesses to bolster their defence, the testimonies of those witnesses have no impact on the issues for decision. Hence, I see no need to rehearse their testimonies.

The Law

[17] The burden remains on the State prove the guilt of the accused beyond reasonable doubt.

(See: R v Du Plessis 1924 T.P.D 103; R v Kham 1943 AD 324)

[18] An accused is presumed innocent until proven guilty according to law.

(See: Article 12 of the Constitution of the Republic of Namibia)

[19] Where an accused makes a confession to a Magistrate, such statement is inadmissible as against a second joint accused.

(See: R v Black 1923 AD 38)

[20] The confessions were not introduced as evidence and cannot be relied upon as evidence to show guilt of the first and second appellants. Equally the confession cannot be the basis of guilt of the third and fourth appellants.

[21] *“In all cases that turn on identification the greatest care should be taken to test the evidence. Witnesses should be asked by what features, marks or indications they identify the person whom they claim to recognise. Questions relating to his height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough. Such a statement unexplored, untested and uninvestigated, leaves the door wide open for the possibility of mistake. Where the accused is an ignorant native who is unrepresented by counsel or*

attorney and who is therefore unable himself to probe the evidence of identification and where the prosecutor has not done so, the Court should undertake this task, as otherwise grave injustice may be done.”

(See: R v Shekelele & Another 1953 (1) SA 636 (T))

Evaluation of the evidence in the proceedings

[22] It is common cause that the trial Court found that the complainants were involved in an illegal transaction, not to fish. I agree because there is no evidence that the complainants went fishing on one single day or occasion. On the assault, I pause to ask myself why Mokone failed to have informed the police of the alleged assault which is such a material part of the allegations against the accused. There is no medical evidence of assault – eg J88.

[23] Another aspect is the number of people who perpetrated the robbery. Both Mokate and Jacobs told the police that two people, armed with pistols and clad with camouflage assaulted them whereas the evidence in Court was that there were three assailants.

[24] There is furthermore no evidence on why the Court accepted that the identification of the appellants may not be mistaken given the fact that they were in camouflage, unknown to the witnesses and seen for the first time at a scene that was characterised with commotion and fear.

[25] The Courts have always cautioned that greater care be taken to test evidence of identification. Witnesses should be asked by what features, marks or indications they identify the person whom they claim to recognise.

(S v Shekelele, supra)

[26] The learned Trial Magistrate found that the first appellant had mentioned the particulars of the fourth appellant to the Magistrate who took the confession. This conclusion is impermissible in law because the alleged written confession was never

even tendered or admitted as evidence in Court and that Magistrate never testified despite the challenge by the first and second appellants and that the alleged confession was excused by threats and assault.

[27] It is for the foregoing reasons that we held that the State has failed to prove its case beyond reasonable doubt, that the appeal succeeds in respect of all the appellants and that the convictions and sentences are set aside.

G Hinda
Acting Judge

K van Niekerk
Judge

APPEARANCE

APPELLANTS:

Mr J Wessels
of Stern & Barnard

RESPONDENT:

Mr B S Konga
Office of the Prosecutor-General